Supreme Court, U.S.
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No. 90-1561

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

BORDEN, INC.,

Petitioner,

v.

MEIJI MILK PRODUCTS CO., LTD.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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May 8, 1991

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Should certiorari be granted where the underlying litigation is moot because Petitioner is no longer requesting a preliminary injunction in aid of arbitration, the only relief sought in the proceedings below?

2. Should certiorari be granted so this Court may consider whether, in the context of a district court's determination of a *forum non conveniens* motion, the adequacy of an alternative forum must be analyzed at the beginning as opposed to the end of the decision, where the Court of Appeals for the Second Circuit has characterized this argument as "ludicrous," and there is no conflict in the Courts of Appeal on this issue?

3. Should certiorari be granted so this Court may consider whether a district court may dismiss a complaint on *forum non conveniens* grounds after receiving extensive written submissions by the parties, but without hearing oral argument, where the Court of Appeals for the Second Circuit has found that the failure to hear oral argument did not affect the outcome of the district court's *forum non conveniens* analysis?

RULE 29.1 STATEMENT

As required by Rule 29.1 of the Rules of the United States Supreme Court, Meiji Milk Products Co., Ltd. states that its subsidiaries, non-wholly owned, are:

Hokkaido Meihan K.K.
Tokyo Milk Unyu K.K.
Meiji Frozen K.K.
Osaka Hosho Milk K.K.
Sanin Meiji Milk K.K.
Tochigi Meihan K.K.
Fukui Meihi Milk K.K.
Shiga Meihan K.K.
Kyoto Meihan K.K.
K.K. Asahi Broiler
Meiji Custom Beef K.K.
K.K. Kantora
K.K. Saimei
Tokyo Sharyo K.K.
Hamamatsu Milk K.K.
Hamamatsu Meiji Milk K.K.
Fukushima Meiji Milk K.K.
Nippon Kanzume K.K.
K.K. Camp
Meiji Kenko Ham K.K.
Meiji Borden K.K.
Okinawa Meiji Milk K.K.
K.K. KCS
Hakodate Ice Cream K.K.
Meiji Frozen Desert K.K.
Kumamoto Meiji Milk K.K.
Mie Meiji Milk K.K.

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OPINIONS BELOW AND JURISDICTION

The opinions below are set forth as Appendices 1-61 to the petition for writ of certiorari ("petition"). While Petitioner claims that jurisdiction lies under 28 U.S.C. § 1254(1), Respondent disputes that claim for the reasons set forth herein.

I.

COUNTERSTATEMENT OF THE CASE

Preliminary Statement

Both legally and factually, this case differs substantially from the one depicted by Petitioner Borden, Inc. ("Borden"). At the outset, the petition is moot because Borden has declared that it is no longer seeking a preliminary injunction in aid of arbitration, which is the only relief that Borden requested in the proceedings below. Indeed, Borden has yet to commence an arbitration proceeding in Japan although the standing three-member "Joint Arbitration Committee" designated Japan as the location of the arbitration over four months ago on December 20, 1990.[1]

Borden also fails to provide the "special and important reasons" necessary for issuance of a writ of certiorari as required by Rule 10.1 of this Court's rules. Borden's first argument, that a district court must discuss *forum non conveniens* factors in a specific *order* in its opinion, was labelled "ludicrous" by the Court of Appeals for the Second Circuit. Not surprisingly, there is no conflict in the decisions of the Circuits.

Borden also fails to demonstrate that the district court and Second Circuit "so far departed from the accepted and usual course of judicial proceedings" as to invoke this Court's cautiously exercised "powers of supervision" pursuant to Rule 10.1 of the Supreme Court Rules. Contrary to Borden's contention, the district court acted properly by dismissing Borden's complaint based on the extensive record submitted by the parties, although without hearing oral argument. Further, the Second Circuit correctly found that any alleged "erroneous assumption" that might have resulted from the district court's decision not to hear oral argument did not prejudice the outcome of its *forum non conveniens* analysis.

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[1] The Joint Arbitration Committee determines the location of arbitrations pursuant to a September 1952 trade agreement between the Japan Commercial Arbitration Association and the American Arbitration Association (the "Japan-U.S. Trade Agreement").

Therefore, Respondent Meiji Milk Products Co., Ltd. ("Meiji") respectfully requests that this Court deny the petition for writ of certiorari.

The Parties

Petitioner Borden is a New Jersey corporation with its principal place of business in Columbus, Ohio. Borden is engaged in the manufacture and distribution of food, dairy, and consumer products. (A 27)[2] Respondent Meiji is a Japanese corporation with its principal place of business in Tokyo. Meiji is engaged in the manufacture and distribution of milk and milk products primarily in Japan. (A 27-28)

The Margarine Agreement

In 1983, Meiji and Borden entered into a trademark license and technical assistance agreement involving margarine products (the "Margarine Agreement") pursuant to which Borden granted Meiji an exclusive license to use in Japan certain Borden trademarks on margarine products. (A 28-29) The margarine products sold under Borden's name were manufactured by Meiji in Japan with Meiji's proprietary technology and formulas, and were sold exclusively to Japanese consumers. (A 29)

Throughout the term of the Margarine Agreement, all of the margarine products manufactured by Meiji were sold in packaging designed and developed solely by Meiji. (A 29) Meiji filed the packaging designs with the Japan Patent Office in 1983 to protect its rights to its packaging, and these designs were registered in Meiji's name on October 25, 1985 and January 31, 1986. (A 29) As a matter of Japanese law, these publicly available design registrations provide Meiji with the exclusive right to use the packaging in Japan and bar any claim of unfair competition under Japanese law. (Kadet Aff ¶7)[3] Further, the agreement

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[2] Citations to "A" are to the Appendices to the petition for writ of certiorari.

[3] See Affidavit of Samuel Kadet In Opposition to Motion For An Injunction Pending Appeal and in Response To Motion For An Expedited Appeal filed in the Court of Appeals for the Second Circuit (No. 90-8086), annexed hereto as Appendix 1 ("Kadet Aff"). To avoid burdening the Court, we have not submitted the voluminous exhibits annexed to the Kadet Affidavit.

granted Borden no right of ownership to any packaging or product designations. (Kadet Aff ¶8)

The Margarine Agreement expired by its terms on October 3, 1990. Subsequently, Meiji has continued to use the same margarine products and packaging, but has ceased using the Borden name and logo; the margarine products now bear only Meiji's name. (Kadet Aff ¶15)

The Demand To Determine
The Situs Of The Arbitration

On August 24, 1990, Borden filed with the American Arbitration Association in New York an arbitration demand (the "Situs Demand") under Section 16 of the Margarine Agreement. Section 16 provides that any disputes arising in connection with the contract shall be settled by arbitration pursuant to the Japan-U.S. Trade Agreement. (A 30-31)

Since the Margarine Agreement did not set any location for the arbitration, the only effect of the Situs Demand was to convene a panel from the Joint Arbitration Committee which would then decide the location of the arbitration. (Kadet Aff ¶9) Meiji argued that Japan was the proper location for the arbitration since the dispute involved products manufactured and sold only in Japan to Japanese consumers, affected only Japanese commerce, and almost all witnesses and documents were located in Japan. The Joint Arbitration Committee, agreeing with Meiji's position, issued a decision on December 20, 1990, that any dispute involving the Margarine Agreement should be arbitrated in Japan.* (Kadet Aff ¶9)

Over four months have elapsed since the decision by the Joint Arbitration Committee was issued, yet to date Borden has not taken a single step to commence arbitration proceedings in Japan. Borden has not even filed a Demand for Arbitration with the Japan Commercial Arbitration Association.

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* Meiji also argued to the Joint Arbitration Committee that Japan was the proper location for arbitration of a dispute between Borden and Meiji concerning an agreement involving ice cream ("Ice Cream Agreement"). The committee agreed and designated Japan as the proper location for arbitration of both the Margarine and Ice Cream Agreements in its December 20, 1990 decision.

Prior Judicial Proceedings

District Court

On August 30, 1990, Borden commenced this action against Meiji in the United States District Court for the Southern District of New York. In its complaint, Borden asserted two claims, one for breach of contract under Section 4.3 of the Margarine Agreement and one for "wrongful destruction of goodwill." (A 32-33) By way of relief, Borden requested in its complaint that the District Court issue a preliminary injunction prohibiting Meiji from using the disputed packaging until the arbitration was concluded. (A 32-33)

At a hearing held on September 5, 1990, the district court heard argument on, and then denied, Borden's request for a preliminary injunction in aid of arbitration. The Court scheduled a further hearing for September 25, 1990. (A 33) In addition, Meiji was given leave to file a motion to dismiss on *forum non conveniens* grounds, also to be made returnable on September 25. (A 33-34)

Meiji filed its motion for a *forum non conveniens* dismissal on September 7, 1990. The answering papers were filed on September 17, and Meiji's reply was filed on September 21. (A 11) In addition to the briefs, both parties collectively submitted ten affidavits, including six affidavits from Japan, as well as numerous exhibits, articles and other legal materials. Thus, the district court had an extensive record upon which to base its decision. (Kadet Aff ¶¶14, 15)

Meiji contended in its papers that a New York court should decline to adjudicate the margarine lawsuit, much less issue a preliminary injunction, since the dispute involved only Japanese commerce and had no effect whatsoever on United States commerce. Further, Meiji observed that virtually every significant event underlying the dispute occurred in Japan and that the great majority of witnesses were Japanese citizens and residents. Meiji also noted that Japan was an adequate forum in which to litigate this action since the Japanese courts had special

proceedings in which Borden's request for a preliminary injunction could be heard promptly.

Borden, on the other hand, argued primarily that the district court should not dismiss its complaint because Japan was an inadequate forum in which to seek a preliminary injunction. According to Borden, "[a]ny request by Borden for injunctive relief would be litigated before the Japanese courts for months if not years." (Plunkett Aff ¶62(b)(ii))[5]

On Thursday, September 20, 1990, counsel for Meiji was advised by a law clerk that the district court wished to receive Meiji's reply papers on its motion to dismiss by 3 p.m. on September 21, instead of at 5 p.m. Meiji complied with this request. (A 11) On Friday, September 21, 1990, at approximately 6:15 p.m., the district court's chambers informed counsel for Meiji and Borden that the court had determined to dismiss Borden's complaint on the grounds of *forum non conveniens*. (A 11)

On October 3, 1990, the district court issued its Opinion concerning the *forum non conveniens* dismissal. (A 11-12) In the Opinion, the court specifically held "at the outset": "It is the finding of the court that the *defendant has carried the burden of showing the availability of an alternative forum*." (emphasis added) (A 37) After making this finding, the district court proceeded to fully analyze each of the *forum non conveniens* factors set forth in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947). (A 37-55)

Borden states in the petition that, because the district court did not hear oral argument on the *forum non conveniens* motion, the district court was not aware that on September 21, "Borden and Meiji had agreed that no Japanese witness would be called at the preliminary injunction hearing . . ." (Pet 9)[6]

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[5] *See* Affidavit of Kevin J. Plunkett in Support of Motion for an Injunction Pending Appeal Pursuant to Fed. R. App. P. 8(a), filed in the Court of Appeals for the Second Circuit (No. 90-8086).

[6] Citations to "Pet ____" are to the petition for writ of certiorari filed April 7, 1991.

Borden's statement is simply not true. Counsel for Meiji had in fact planned to bring a Meiji executive from Japan to the September 25 hearing, and had reserved the right to call him as a witness. (Kadet Aff ¶16)

Further, Borden did not seek reargument or otherwise challenge any of the district court's alleged factual errors or "erroneous assumption" about witnesses, although Civil Rule 3(j) of the Rules of the United States District Court for the Southern District of New York provides that a notice of motion for reargument may be served within ten days after the court's opinion has issued if there are "matters or controlling decisions which counsel believes the court has overlooked."

The Appeal to the Second Circuit

Instead of bringing its version of the agreement concerning witnesses to the attention of the district court by seeking reconsideration, Borden proceeded on to the United States Court of Appeals for the Second Circuit. On October 3, 1990, Borden filed its Notice of Appeal and made a motion to the Second Circuit for an injunction barring Meiji from using the disputed packaging pending appeal and for an expedited appeal. (A 24) On October 9, 1990, a panel of the Second Circuit heard oral argument on Borden's motion. At the conclusion of oral argument, the Court granted Borden's unopposed request for an expedited appeal, but denied its motion for an injunction pending appeal. (A 22, 23)

Oral argument was heard on Borden's appeal on November 13, 1990. On November 21, 1990, the Second Circuit affirmed the district court's dismissal of Borden's complaint on *forum non conveniens* grounds. The court gave Borden leave to file a new action in district court, however, if Borden applied for injunctive relief in Japan and the Japanese Court did not entertain the application within sixty (60) days after it was filed. (A 20-21) Borden's petition to the Second Circuit for rehearing *en banc* was denied on January 7, 1991. (A 1, 2) The Second Circuit issued its mandate on January 22, 1991. (A 5, 6)

The Petition For Writ Of Certiorari

Borden filed the petition on April 7, 1991, almost seventy-five days from the date that the Second Circuit issued its mandate on January 22, 1991, and over four months from the time that the Second Circuit issued its Opinion on November 21, 1990.[7]

Borden never filed any action in Japan for alleged breach of the Margarine Agreement. In fact, Borden has conceded in the petition that it will not file an action in Japan because "the Margarine Agreement ha[s] expired." (Pet 14, n.4)

Moreover, Borden has also conceded that it "has not yet filed its demand for arbitration in Japan," even though it has been well over four months since the Joint Arbitration Committee issued its decision that any arbitration proceedings in this dispute and the dispute between the parties involving ice cream must be held in Japan. (Pet 6, n.2) Thus, Borden failed to take a single step to commence the arbitration in aid of which it ostensibly sought a preliminary injunction from the district court.

II.

REASONS FOR DENYING THE WRIT

A. THE PETITION IS MOOT BECAUSE BORDEN IS NO LONGER SEEKING THE RELIEF REQUESTED IN THE PROCEEDINGS BELOW

A federal court is "without power to decide questions that cannot affect the rights of litigants in the cases before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) (citing *Oil Workers Union v. Missouri*, 361 U.S. 363, 367 (1960)). Thus, a case becomes moot and cannot be reviewed by this Court "'when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome.'" *Murphy v.*

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[7] Borden's lackadaisical filing of its petition for a writ of certiorari may be explained in part by the fact that it is no longer seeking a preliminary injunction, the relief requested below. (Pet 14, n.4)

Hunt, 455 U.S. 478, 481 (1982) (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980), *cert. denied*, 456 U.S. 1103 (1984)).

Conspicuously absent from Borden's petition is any specific request for relief. This is because Borden lacks a "legally cognizable interest" in this litigation. Borden petitions this Court to consider the district court's denial on *forum non conveniens* grounds of Borden's request for a preliminary injunction in aid of arbitration *even though Borden is no longer seeking any preliminary injunction*. In fact, Borden has yet to take any action to file a demand for arbitration in Japan, although it has had over four months to do so.

In a footnote to its petition, Borden attempts to explain its decision not to seek a preliminary injunction by noting that "[t]he Court of Appeals modified the District Court by permitting Borden to commence a new action in the District Court if a Japanese Court did not decide Borden's application within 60 days of filing." (Pet 14, n. 4) Borden then claims that "[b]y the time the decision of the Court of Appeals was filed and the petition for rehearing denied, the Margarine Agreement had expired. Accordingly, Borden did not file for a preliminary injunction in Japan in this case." (*Id.*) But, as this Court recently held in *Deakins v. Monaghan*, 484 U.S. 193, 199-200 (1988), when, as here, an underlying claim for preliminary injunctive relief is withdrawn, any petition for certiorari on issues arising out of those claims is mooted. This is true even though "a controversy existed at the time the complaint was filed, and continued to exist when review was obtained in the Court of Appeals." *Id.* at 199.

Although Borden admits that it is not seeking a preliminary injunction, Borden incorrectly assures this Court that "[t]his case presents a justiciable controversy to the extent that direction from this Court" is necessary to "clarify" the law and "correct" irregular procedural practices. (Pet 18, 30) This Court has repeatedly admonished, however, that "[t]o be cognizable in a federal court, a suit . . . 'must be a real and substantial controversy admitting of specific relief through a decree of a

conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Rice*, 404 U.S. at 246 (quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937)).

Borden's petition is moot, and is nothing more than an attempt to obtain an advisory opinion from this Court. "'[M]oot questions require no answer.'" *Rice*, 404 U.S. at 246 (quoting *Missouri, Kansas & Texas Ry. Co. v. Ferris*, 179 U.S. 602, 606 (1900)). Therefore, a writ of certiorari should not issue.

B. BORDEN'S COMPLAINT WAS PROPERLY DISMISSED PURSUANT TO THE DOCTRINE OF *FORUM NON CONVENIENS*

The standards for grant of a writ of certiorari are stringent. "A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only when there are special and important reasons therefor." Sup. Ct. R. 10.1. Borden has wholly failed to meet these requirements because, as the Court of Appeals for the Second Circuit correctly found, the district court properly applied the factors for the doctrine of *forum non conveniens* articulated by this Court in *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501 (1947).

This Court has instructed that, under the doctrine of *forum non conveniens*, a court may dismiss an action over which it has jurisdiction when, considering a series of private and public interest factors and the availability of an alternative forum, it is more appropriate to resolve the dispute in another forum. *Id.* at 507. Further, an appellate court may overturn a trial court's dismissal on the ground of *forum non conveniens* only if the trial court committed "a clear abuse of discretion." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 237 (1981).

1. The District Court Did Not Commit A Clear Abuse Of Discretion In Finding That Japan Was An Adequate Alternative Forum

Borden's first argument on appeal does not challenge the district court's application and weighing of the various public

and private interests factors identified by the Supreme Court in *Gulf Oil Corp. v. Gilbert*. Rather, Borden challenges the district court's finding that Japan was an adequate alternative forum in which Borden could seek a preliminary injunction in aid of arbitration. Borden specifically attacks, as it did on appeal, the district court's opinion on the theory that it improperly placed on Borden the burden of demonstrating that Japan was not an adequate alternative forum. (Pet 26, n.6) According to Borden, the district court shifted the burden of proof by failing to consider "at the outset" whether Japan was an adequate alternative forum — a requirement Borden claims must be read into this Court's holding in *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981).[5] (Pet 22, 26, n.6)

As a preliminary matter, the district court did in fact determine that an alternative forum was available "at the outset" of its opinion. *Prior* to analyzing the *Gilbert* factors, the court held: "It is the finding of this Court that the defendant has carried the burden of showing the availability of an alternative forum." (A 37)

With respect to Borden's argument that *Piper Aircraft* requires a "sequential" analysis of *forum non conveniens* issues, the Second Circuit admonished Borden that its argument "borders on the frivolous." (A 19) The court stated:

> We do not read Piper Aircraft to require a rigidly formalistic approach to *forum non conveniens* inquiries. Courts are required to consider whether an alternative

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[5] Borden relies on the following language in *Piper Aircraft*:

> At the outset of any *forum non conveniens* inquiry, the court must determine whether there exists an alternative forum. Ordinarily, this requirement will be satisfied when the defendant is "amenable to process" in the other jurisdiction. In rare circumstances, however, where the remedy offered by the other forum is clearly unsatisfactory, the other forum may not be an adequate alternative, and the initial requirement may not be satisfied.

454 U.S. at 254 n.22 (quoting *Gilbert*, 330 U.S. at 506-07).

> forum exists. Whether they do so at the beginning, the middle, or the end of written opinions is not dispositive of the adequacy of their analyses. We believe that Borden's suggestion to the contrary is ludicrous.

(A 19)

In any event, regardless of whether the district court considered the adequacy of the alternative forum "at the outset" or conclusion of its analysis, it clearly placed the burden of proof on that issue on Meiji. The district court stated in its opinion that "[i]t is the finding of the Court that [Meiji] has carried the burden of showing the availability of an alternative forum." (A 37)[9] The Second Circuit confirmed that "[t]he district court squarely addressed the adequacy of Japan as a forum in its written opinion and clearly indicated that it was Meiji that bore the burden of demonstrating its adequacy." (A 19)[10]

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[9] The record evidence before the district court fully justified its finding that Japan is an adequate alternative forum. The district court relied on affidavits of Japanese attorneys, as well as Japanese and American authorities, which confirmed that an injunction in aid of arbitration can be obtained in the Japanese courts in an appropriate case.

[10] Borden also misleadingly claims that its "position that no adequate alternative forum exists is fairly supported" because, in the dispute between the parties involving ice cream, the Japanese court did not issue a decision on Borden's application for a preliminary injunction within sixty days. (*See* Pet 14, 15 n.4) Because Borden improperly introduced this matter, which is outside of the record, Meiji must correct Borden's distortion of the facts about the ice cream litigation in Japan.

In fact, the expeditious manner in which the Japanese Court handled Borden's application for an injunction in aid of arbitration demonstrates that Japan provides a perfectly adequate forum in which to litigate Borden's injunction application. The 9th Division of the Tokyo District Court, which handles requests for emergency relief, acted swiftly and intensively on Borden's application for an injunction. Two conferences and two hearings were conducted within a month after Borden's application was filed on February 6, 1991. Between February 27 and March 14, the Japanese Court also devoted

(Footnote continued)

In the face of the Second Circuit's severe criticism of Borden's argument as "ludicrous," Borden raises the same argument before this Court. Borden is still unable to explain, however, how the *order* in which *forum non conveniens* issues were considered by the district court served to shift the burden of proof to Borden, or altered the outcome of the court's determination that Japan was an adequate alternative forum. In fact, the practical reason why courts often analyze the alternative forum issue "at the outset" is that, if an alternative forum does not exist, then the public and private interest factors do not need to be addressed. When, as here, the Court determines that an adequate alternative forum exists, then the Court must address all of the *Gilbert* factors. But we submit that the order in which the court does so is of little moment.

There is no basis whatsoever to grant certiorari on this issue.

2. There Is No Conflict In The Courts Of Appeal

Borden makes a transparent attempt to manufacture a conflict among the United States Courts of Appeal by contending that at least three circuits require a strict sequential analysis of the *forum non conveniens* factors. Not surprisingly, none of the authorities cited by Borden address, much less support, Borden's argument that a court's analysis of *forum non conveniens* issues is fatally flawed unless the issue of an adequate alternative forum is discussed "at the outset" of the court's analysis.

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over two weeks to mediating four settlement negotiation conferences, a common practice in Japan. At the conclusion of the last settlement conference on March 14, the Chief Judge of the Japanese Court stated in open court that the Court expected to issue a written decision by the end of March, although that date could extend to the beginning of April in order to finish the final printing.

It is noteworthy that, although a decision from the Japanese Court was imminent on Borden's application for a preliminary injunction, Borden unilaterally withdrew its application in the first hours of the sixty-first day, and sought to refile its motion for a preliminary injunction with the District Court for the Southern District of New York, which is considering the application.

In fact, only one other circuit court, the Court of Appeals for the District of Columbia, has even considered whether a *forum non conveniens* analysis must be conducted in a systematic manner, and that court rejected such a rigid approach. *See Friends for All Children, Inc. v. Lockheed Aircraft Corp.*, 717 F.2d 602, 606 (D.C. Cir. 1983). In *Lockheed Aircraft*, the appellants argued that the district court erred in failing to dismiss an action on *forum non conveniens* grounds because the court did not consider in a "systematic" manner the factors relevant to a *forum non conveniens* analysis. Indeed, in that case, unlike in this action, the D.C. Circuit concluded that the district judge had only cursorily addressed the issue of an adequate alternative forum. Nevertheless, the court rejected appellant's argument, concluding:

> While *forum non conveniens* motions are to be evaluated through the exercise of structured discretion, appellants go too far in arguing that the trial court must address and explicitly weigh, one against the other, each of [the *forum non conveniens*] factors. Nothing so mechanical is required. Availability of adequate alternative fora is a threshold test only in the sense that a *forum non conveniens* motion cannot be granted unless the test is fulfilled.

Id. at 607.[11]

The decisions cited by Borden in support of its argument that there is a conflict within the circuits are inapposite since the *order* in which the trial court addressed the *forum non conveniens*

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[11] By contrast, the cases are legion in which the trial court did not consider the issue of an alternative forum "at the outset" of its *forum non conveniens* analysis. *See, e.g., Travelers Indemnity Co. v. S/S Alca*, 710 F. Supp. 497, 502 (S.D.N.Y.), *aff'd mem.*, 895 F.2d 1410 (2d Cir. 1989); *Flair Resources, Ltd. v. Peat Marwick Int'l*, Civ. No. 87-105-RE (D. Or. Feb. 8, 1988) (1988 U.S. Dist. Lexis 17481); *Tisdale v. Shell Oil Co.*, 723 F. Supp. 653, 658-59 (N.D. Ala. 1987); *Broadcasting Rights Int'l Corp. v. Societe du Tour de France*, 675 F. Supp. 1439 (S.D.N.Y. 1987); *Shields v. Mi Ryung Constr. Co.*, 508 F. Supp. 891, 895-97 (S.D.N.Y. 1981).

issues was not in dispute. Rather, these cases merely repeat the standards for a *forum non conveniens* analysis articulated by this Court in *Gilbert* and *Piper Aircraft*.[12]

* * *

In sum, the district court meticulously undertook an analysis of all relevant factors and concluded that *forum non conveniens* dismissal was appropriate. Further, there is no support whatsoever, either legal or factual, for Borden's argument that a district court clearly abuses its discretion when it does not consider the question of whether an adequate alternative forum exists "at the outset" for a *forum non conveniens* analysis. There is, thus, no basis to conclude that the district court abused its discretion, no conflict among the courts of appeals, and no reason for a writ of certiorari to issue here.

C. THAT THE DISTRICT COURT DID NOT HEAR ORAL ARGUMENT IS NOT AN IMPROPER PROCEDURE AND, IN ANY EVENT, DID NOT ALTER THE OUTCOME OF ITS ANALYSIS

Borden's next challenge to the district court's dismissal of its complaint, and the Second Circuit's affirmance thereof, is based on the flawed premise that the district court committed a procedural irregularity by rendering a decision without entertaining oral argument, even though the court had received full written submissions by both parties. (Pet 27, 28) Borden contends that the district court thereby made an allegedly erroneous finding of fact that witnesses from Japan would attend the

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[12] For example, in *Quintero v. Klaveness Ship Lines*, 914 F.2d 717 (5th Cir. 1990), the issue was whether the district court properly included a choice-of-law determination as part of the public interest factors in a *forum non conveniens* analysis. The Fifth Circuit, in holding that the choice-of-law question was properly considered as a public interest factor, merely noted that the methodology employed by the district court in its *forum non conveniens* analysis was sound. The appellant did not raise, and the Fifth Circuit did not consider, whether a district court must conduct its *forum non conveniens* analysis in any particular order.

preliminary injunction hearing when, according to Borden, the parties had agreed prior to the district court's decision that no witnesses from Japan would be called.[13] (A 28) Borden asserts that this "erroneous assumption" would have been brought to the court's attention at oral argument, and would have changed the outcome of the district court's *forum non conveniens* analysis. Based on these alleged procedural irregularities, Borden seeks to invoke this Court's cautiously exercised "power of supervision" to regulate proceedings in the federal courts. *See* Sup. Ct. R. 10.1(a).[14]

Borden completely fails to show under Rule 10.1(a) that either the district court or the Second Circuit "so far departed from the accepted and usual course of judicial proceeding" as to require the exercise of this Court's supervisory powers. First, the

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[13] Borden's claim that no witnesses from Japan were scheduled to attend the preliminary injunction hearing is flatly wrong. A Meiji executive was in fact scheduled to arrive in New York for the hearing, and counsel for Meiji had expressly reserved the right to call him as a witness. (Kadet Aff ¶ 6)

[14] It is respectfully submitted that this Court's "power of supervision" should be exercised only where "[s]uch cases qualify for review by reason of their importance, novelty or difficulty." R. Stern & E. Gressman, *Supreme Court Practice* 220 (6th ed. 1986). For example, this Court's supervisory powers have been used in criminal proceedings where convictions have been obtained through abusive practices by the trial court, or where important procedural issues have arisen regarding rules of evidence and prosecutorial misconduct. *See, e.g., McNabb v. United States*, 318 U.S. 332, 341 (1943) (establishing this Court's supervisory authority to set procedures for the admissibility of evidence in criminal trials); *Jenkins v. United States*, 380 U.S. 445, 446 (1965) (reversing conviction based on improper instruction to the jury that a verdict had to be reached); *see also*, Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits On The Authority Of The Federal Courts*, 84 Colum. L. Rev. 1433, 1434 (1984). In civil proceedings, this Court has rarely exercised its supervisory powers, and then almost exclusively for important and far-reaching procedural issues, such as the establishment of the work-product doctrine. *See Hickman v. Taylor*, 329 U.S. 495 (1947). In contrast to these important precedents, Borden's irritation that the district court did not entertain oral argument before dismissing its complaint certainly lacks the "importance, novelty or difficulty" required to invoke this Court's supervisory powers.

district court's decision to render its opinion based on the briefs and affidavits filed by the parties, and not to hear oral argument, is a wholly proper procedure. Second, the district court's finding of fact that witnesses from Japan would be attending the preliminary injunction hearing, one of numerous findings made by the court, did not alter the outcome of its analysis and, in any event, is a finding of fact not suitable for review by this Court.

1. **Denial Of Oral Argument Was Proper**

The district court was authorized to dispense with oral argument. "[L]itigants are not entitled as a matter of right to an oral hearing on every motion." *Goodpasture v. Tennessee Valley Auth.*, 434 F.2d 760, 764 (6th Cir. 1970) (citing *Link v. Wabash R.R. Co.*, 370 U.S. 626 (1962)). Rather, the decision whether to hear oral argument on a motion lies in the sound discretion of the court as part of its administrative function. *See Bratt v. IBM Corp.*, 785 F.2d 352, 363 (1st Cir. 1986). Indeed, the practice of dispensing with oral arguments on motions except in complicated cases is recommended by eminent authorities. *See Proceedings of the Seminar on Procedures for Effective Judicial Administration*, 29 F.R.D. 191, 301 (1961).

Consistent with this practice, Civil Rule 3(i) of the Rules of the United States District Court for the Southern District of New York states that "[t]he judge may direct the parties to submit motions and may determine them without oral hearing." This rule is expressly authorized by Fed. R. Civ. P. 78, which provides that in order to expedite its business, the court may provide by local rule for the submission and determination of motions without oral hearing. The district court's decision to act upon Meiji's motion to dismiss on *forum non conveniens* grounds without hearing oral argument was therefore entirely proper. *See Morrow v. Topping*, 437 F.2d 1155, 1156 (9th Cir. 1971) ("Failure to have oral argument before acting upon the motion to dismiss was therefore in full accordance with established procedure.")

2. The District Court's Alleged "Erroneous Assumption" About Witnesses Did Not Prejudice The Outcome Of Its Analysis And, In Any Event, Is A Factual Finding Not Suitable For Review By This Court

According to Borden, "the District Court's analysis of the [*Gilbert*] factors would have been substantially different if the District Court Judge was aware of the parties' agreement not to call Japanese residents as witnesses." (Pet 28, 29) Borden then argues that the Second Circuit "failed to accord proper weight to the import such error may or may not have had on the District Court's ultimate dismissal on *forum non conveniens* grounds." (Pet 29)

Contrary to Borden's contention, the Court of Appeals for the Second Circuit fully reviewed the district judge's findings, and properly concluded that no abuse of discretion had occured. The Second Circuit stated:

> While the court's unorthodox procedure deprived the court of full information, we are satisfied that it did not fatally undermine the court's findings. Its *Gilbert* analysis was comprehensive and was not limited to the question of the residence of the primary witnesses. Rather, the court considered such additional important factors as the enforceability of relief and the primacy of Japan's interest in the litigation.

(A 18) In addition, the district court also weighed the fact that it might wish to question other witnesses from Japan "whom the parties might not have thought to call and over whom the parties might not have any authority." (A 40) Thus, Borden's argument that the Second Circuit did not accord proper weight to the alleged error of fact is without any merit.

Further, any challenge here to the district court's factual finding must fail in light of the well-settled rule that findings of fact will not be overturned unless they are clearly erroneous, and the repeated admonition by this Court that it "cannot undertake to review concurrent findings of fact by two courts below

in the absence of a very obvious and exceptional showing of error." *Graver Tank & Mfg. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949), *aff'd*, 339 U.S. 605 (1950). Borden clearly has not made such an "exceptional showing" as to warrant review by this Court.[15]

Finally, Borden theatrically claims that it suffered a denial of due process because of the district court's alleged "erroneous assumption." However, if Borden believed that it had been unable to bring a dispositive fact to the attention of the court because oral argument was not held, then Borden had ten days to seek reargument after the district court's opinion issued pursuant to Civil Rule 3(j) of the United States District Court for the Southern District of New York.[16]

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[15] Borden attempts to salvage its argument by citing *Cliffs Notes, Inc. v. Bantam Doubleday Dell Publishing Group*, 886 F.2d 490, 493 (2d Cir. 1989) for the proposition that "[c]ase law in the Second Circuit dictates that an erroneous finding of fact amounts to an abuse of discretion." (Pet 29) This misstates the holding in *Cliffs Notes*.

What the Second Circuit actually stated in *Cliffs Notes* is the well-settled principle that " '[a]n abuse of discretion may be found when the district court relies on clearly erroneous findings of fact or on an error of law in issuing the injunction.' " *Cliffs Notes*, 886 F.2d at 493 (quoting *Hanson Trust PLC v. SCM Corp.*, 774 F.2d 47, 54 (2d Cir. 1985)) For the reasons set forth herein, the Second Circuit fully considered the argument that the district court might not have had "full information," but concluded that myriad other considerations supported the district court's *forum non conveniens* dismissal.

[16] Borden takes a passing shot at the Second Circuit for concluding that certain New York procedural rules, which Borden erroneously claimed barred dismissal of this action on *forum non conveniens* grounds, are inapplicable to this action. (Pet at 16, n. 5) The opinion of the Second Circuit and the district court properly held that those rules are inapplicable based on the record, and that federal *forum non conveniens* precedent controlled. (*See* A14-15, A46-49)

III.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

Dated: New York, New York
May 8, 1991

Respectfully submitted,

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APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BORDEN, INC., Plaintiff-Appellant, -against- MEIJI MILK PRODUCTS CO., LTD., Defendant-Appellee.	No. 90-8086 AFFIDAVIT IN OPPOSITION TO MOTION FOR AN INJUNCTION PENDING APPEAL AND IN RESPONSE TO MOTION FOR AN EXPEDITED APPEAL

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

SAMUEL KADET, being duly sworn, deposes and says:

1. I am a member of the law firm of Skadden, Arps, Slate, Meagher & Flom, attorneys for defendant-appellee Meiji Milk Products Co., Ltd. ("Meiji") in this action. I submit this affidavit in opposition to the motion of plaintiff-appellant Borden, Inc. ("Borden") for an injunction pending appeal and in response to Borden's motion for leave to appeal on an expedited basis, which we do not oppose.

2. Borden is appealing from an Order of the United States District Court for the Southern District of New York, Mary Johnson Lowe, Judge, dismissing its complaint on *forum non conveniens* grounds.* In the complaint, Borden sought a

* A copy of the October 2, 1990 Opinion and Order is attached as Exhibit A to the moving affidavit of Borden's attorney, Kevin J. Plunkett, Esq. (hereinafter "Plunkett Aff. Ex. ____").

preliminary injunction in aid of an arbitration proceeding it commenced last August under a 1983 margarine licensing contract between Meiji and Borden (the "Contract"), a copy of which is annexed hereto as Exhibit 1.*

3. For the reasons set forth more fully below and in Meiji's accompanying Memorandum of Law ("Meiji Mem."), I respectfully submit that Borden's motion for an injunction pending appeal should be denied for at least four separate and independent reasons:

First, Borden cannot show any possibility, much less a strong probability, of succeeding on its appeal from the Order dismissing its complaint on *forum non conveniens* grounds. (Meiji Mem. at 2-5.)

Second, even if Borden could show a substantial likelihood that its complaint will be reinstated on appeal, there is no record on which this Court can review Borden's request for a preliminary injunction in aid of arbitration and thus no basis to determine whether an injunction pending appeal should be issued. More specifically, since the district court dismissed Borden's complaint, it never reached Borden's motion for a preliminary injunction in aid of arbitration. As a result, this Court lacks the findings of fact that provide the usual predicate for resolution of a motion for an injunction pending appeal. (Meiji Mem. at 5-6.)

Third, no injunction pending appeal should be issued in any event because such an injunction would apply only extraterritorially and would interfere with Meiji's rights under Japanese law. Meiji is not a United States citizen, the Contract was always performed exclusively in Japan and any injunction barring Meiji from continuing to use the packaging it designed and registered in Japan with the Japan Patent Office would encroach upon Meiji's intellectual property rights under Japanese law. (Meiji Mem. at 6-7.)

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* The exhibits hereto are hereinafter cited as "Ex. ____".

Fourth, even if this Court were inclined to (a) reach the underlying merits of the packaging dispute and Borden's preliminary injunction motion, and make findings of fact and conclusions of law in the first instance based on the parties' submissions below; and (b) consider issuing an injunction even though it would apply only extraterritorially, the record before the district court amply warranted denial of Borden's motion for a preliminary injunction in aid of arbitration. (Meiji Mem. at 7-10.)

4. Before turning to the factual background to this action and the proceedings below, I wish to stress that an injunction pending appeal would not preserve the *status quo* but would radically alter it. While the Contract was in effect, Meiji manufactured and sold in Japan margarine bearing Borden's name and logo. The Contract, however, expired by its terms on October 3, 1990, and no such margarine is now being sold. As a result, the *status quo* that prevailed prior to October 3, 1990 cannot be preserved by any injunction pending appeal. Moreover, Borden has announced publicly that beginning on October 4, 1990, and, in conjunction with Unilever-Japan, Borden will begin to sell in Japan a new margarine product bearing the Borden name. (Ex. 2) Accordingly, if Meiji were enjoined pending appeal from selling margarine under its own name, which it already has started to do, it would be forced out of the market and thus eliminated for some time as a Borden-Unilever competitor at this commercially sensitive juncture. Although this might well be precisely what Borden hoped to accomplish with the litigation in the district court, and now hopes to accomplish with this motion for injunction pending appeal, it would not preserve any *status quo* of which we are aware.

Factual Background

5. The litigation below arose out of the Contract between Borden and Meiji, a milk and milk products firm headquartered in Tokyo, Japan. In the Contract, Borden licensed Meiji to use in Japan certain specifically identified trademarks and a logo on margarine products manufactured by Meiji entirely in Japan with Meiji's proprietary technology and formulas. In exchange

for this license, Borden was to receive a fixed sum of 50,000,000 yen per year (approximately $200,000 per year based on current exchange rates). (Ex. 1 at § 7, pp. 6-7.)

6. The margarine produced by Meiji under Borden's name always was sold exclusively in Japan to Japanese consumers. (Ex. 3 at ¶ 26.) Indeed, it is undisputed that the Contract has had no effect whatsoever on any United States commerce. (Plunkett Aff. Ex. A at 7.)

7. Throughout the term of the Contract, the margarine was sold in packaging designed and developed exclusively by Meiji. (Ex. 3 at ¶¶ 7-13.)* Shortly after the Contract was executed, Meiji filed the packaging designs with the Japan Patent Office and the designs were thereafter registered in Meiji's name in Japan. (Ex. 3 at ¶ 8.) As a matter of Japanese law, these publicly available design registrations provide Meiji with the exclusive right to use the packaging in Japan and bar any claim of unfair competition under Japanese law. (Ex. 4 at ¶¶ 3-6.)**

8. The Contract grants Borden no right of ownership to any packaging (or product designations). (Ex. 3 at ¶ 9.) While the Contract contains explicit provisions concerning rights to the specific trademarks licensed by Borden, the single reference in the Contract to packaging on which Borden relies simply provides that Meiji must submit samples of packaging to Borden "so that Borden can insure that the use of the Licensed Trademarks is in conformity with Borden's Corporate Identification Standards Manual." (Ex. 1 at p. 4, § 4.4; Ex. 3 at ¶¶ 9-10.)

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* Similarly, all of the product designations, such as "Corn 100," also were developed exclusively by Meiji. (Ex. 3 at ¶ 13.)

** Although Borden seeks in the moving papers to leave the Court with the impression that it never knew about Meiji's registration of the packaging, the record evidence below tells a considerably different story. According to declarations submitted below, Borden-Japan's current President was employed by Meiji in 1983 when the Contract was negotiated and executed, and he admittedly knew then that Meiji had filed for registration the packaging design with the Japan Patent Office. This person also states that when he joined Borden in 1987, he had forgotten about Meiji's filing for registration of the packaging design, only to have his recollection refreshed this past summer.

9. The Contract also contains an arbitration provision requiring that any disputes arising in connection with the Contract be arbitrated in accordance with a September 1952 trade agreement between the Japanese Commercial Arbitration Association and the American Arbitration Association (the "Japan-U.S. Agreement"). (Ex. 1 at § 16, p. 12; Ex. 5.) Under the Japan-U.S. Agreement, the location of any arbitration is to be determined by a standing Joint Arbitration Committee where, as here, the parties have not agreed on a location. (Ex. 5 at ¶ 2.)

10. Meiji is continuing to manufacture the same margarine in Japan and will sell it in Japan in the packaging Meiji developed and registered with the Japan Patent Office. After termination of the Contract, however, Meiji will no longer use any Borden trademark or logo; the margarine products will bear only Meiji's name. (Ex. 3 at ¶ 15.) In addition, commencing on October 4, 1990, Borden, in conjunction with Unilever-Japan, will introduce new margarine products into the Japanese marketplace. (Ex. 2) According to Borden, this new margarine will be sold in Japan in packaging *dissimilar* to the packaging developed and used by Meiji. (Ex. 6 at ¶ 11.)

11. On August 24, 1990, Borden filed a demand for arbitration challenging Meiji's right to use the margarine packaging following termination of the Contract. (Plunkett Aff. Ex. K.) The parties presently are filing submissions with the Joint Arbitration Committee on the question of location of the arbitration.

Proceedings Below

12. On August 30, 1990, Borden commenced this action in which it seeks a preliminary injunction in aid of arbitration, *i.e.*, an injunction prohibiting Meiji from using the disputed packaging pending conclusion of the arbitration. In its complaint, Borden claimed that Meiji's continued use of the packaging would constitute a breach of Section 4.3 of the Contract which provides, in pertinent part, that Meiji will not "take any action which will tend to destroy, damage or impair the [l]icensed [t]rademarks or title thereto." (Plunkett Aff. Ex. F at

4.) In the second count of the complaint, Borden alleged that Meiji's continued use of the packaging would be "wrongful destruction of good will," which presumably is a claim of unfair competition. (*Id.* at 7.)

13. On August 30, 1990, Judge Robert P. Patterson, then sitting as the Part 1 Judge, issued *ex parte* a temporary restraining order prohibiting Meiji from using the disputed packaging. This restraining order expired by its terms on September 5, 1990, at which time the parties were to appear before Judge Lowe, to whom the case had been assigned for all purposes. (Plunkett Aff. Ex. G.)

14. At the hearing on September 5, 1990, Judge Lowe heard argument by counsel on the merits of Borden's case. During the hearing, Borden also requested that the Court extend the restraining order and schedule an evidentiary hearing on Borden's motion for a preliminary injunction. At the conclusion of the September 5 hearing, the court declined the extend the restraining order and scheduled a further hearing for September 25, 1990. In addition, Meiji was given leave to file a motion to dismiss also to be made returnable on September 25. (*See* Plunkett Aff. Ex. H. at 56-57, 63-64.)

15. On Thursday, September 20, 1990, we were advised by Judge Lowe's chambers that the Court wished to receive Meiji's reply papers on its motion to dismiss, due the following day, by 3 p.m. on September 21. We complied with this request, and on Friday, September 21, 1990, at approximately 6:15 p.m., Judge Lowe's law clerk telephoned me and informed me that Judge Lowe had determined to dismiss Borden's complaint on the grounds of *forum non conveniens.*

16. After I expressed our appreciation for the timing of this advice because it enabled our client to avoid the burden and expense of preparation for the September 25 injunction hearing and the need for at least one Meiji official to travel to New York City from Tokyo, Judge Lowe's clerk stated to me that the Court was aware of such considerations and that was why we were being orally informed on Friday night of the Court's resolution of Meiji's motion to dismiss.

17. In view of the dismissal of Borden's complaint, the district court never reached Borden's motion for a preliminary injunction. Accordingly, no findings of fact were made concerning the underlying merits of the trade dress dispute or the relative harms to the parties resulting from granting or denying Borden's motion for a preliminary injunction.

18. Approximately one week after Judge Lowe orally advised us that Borden's complaint would be dismissed, Borden began to clamor for an order from which it could immediately appeal. Borden transmitted letters and a proposed one sentence dismissal order to Judge Lowe and urged her to act. We wrote to oppose entry of any such order without an accompanying opinion setting forth the Court's reasons for its decision in order to insure that a proper basis would exist for appellate review. At this time, we were advised by Judge Lowe's law clerk that an opinion articulating the district court's reasons for its decision was being prepared and would be released as soon as it was completed.

19. On October 1, 1990, Borden ran out of patience and took the extraordinary step of petitioning this Court for a writ of mandamus compelling the district court to enter an order dismissing its complaint. On October 2, 1990, after Judge Lowe released the Opinion and Order, Borden withdrew the mandamus petition.

20. The district judge's Opinion and Order dismissing Borden's complaint is attached as Exhibit A to the moving affidavit of Borden's counsel, Kevin Plunkett, Esq. We submit that the Opinion and Order is thorough, well-reasoned and unassailable on appeal, and we respectfully refer this Court to it.

The Motion for an Expedited Appeal

21. Borden also has moved this Court for leave to prosecute this appeal on an expedited schedule: October 17, 1990 for the filing of Appellant's Brief and the Record on Appeal; October 31, 1990 for Respondent's Brief; and November 5, 1990 for Appellant's Reply Brief, with oral argument at the Court's

convenience. (Plunkett Aff. ¶ 63.) While Meiji Milk believes that no expedited appeal is warranted here, particularly since Borden continues to refuse to pursue its remedies in the Japanese courts, we do not oppose an appeal on the schedule Borden has proposed if this Court is inclined to make room on its docket for it.

22. Finally, I also have annexed hereto copies of the following documents that were part of the record below and are referred to in Meiji's accompanying Memorandum of Law:

EXHIBIT

7. Declaration of Takashi Nagahama in Support of Defendant's Motion to Dismiss executed on September 7, 1990.

8. Declaration of Takashi Nagahama executed on September 21, 1990.

/s/
Samuel Kadet

Sworn to before me this
4th day of October, 1990.

/s/
Notary Public